

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JANN L. BANKS,

Plaintiff,

v.

Civil Action No. 5:05CV62
(STAMP)

LINDA S. McMAHON,¹
Acting Commissioner of Social
Security Administration,

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Background

On April 29, 2005, the plaintiff's appeal of an adverse decision by the defendant, Commissioner of Social Security ("Commissioner"), was transferred to this Court. The case was referred to United States Magistrate Judge John S. Kaull who issued a report and recommendation on December 7, 2006 recommending that the defendant's motion for summary judgment be denied and that the plaintiff's motion for summary judgment be granted. On January 8, 2007, prior to the entry of an order by this Court regarding the report and recommendation, the plaintiff filed a petition for an award of attorney's fees to which the defendant responded. Because this Court had not yet entered a final judgment in this

¹Linda S. McMahon become the Acting Commissioner of Social Security, effective January 22, 2007, to succeed Jo Anne B. Barnhart. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Linda S. McMahon is automatically substituted as the defendant in this action.

matter, Magistrate Judge Kaull issued a report and recommendation recommending that the plaintiff's petition for an award of attorney's fees be denied without prejudice as premature. The magistrate judge informed the parties that if they objected to any portion of the report, they must file written objections within ten days after being served with copies of this report. To date, no objections have been filed to the report and recommendation on the plaintiff's petition for attorney's fees. Because no objections were filed to the report and recommendation on the plaintiff's petition for attorney's fees, the report and recommendation will be reviewed for clear error.

II. Discussion

The magistrate judge recommended that the plaintiff's motion for attorney's fees be dismissed as premature because a final judgment had not yet been entered on the plaintiff's appeal. This Court finds no clear error in the recommendation of the magistrate judge. A party seeking an award of attorney's fees must submit an application to the court "within thirty days of final judgment." 28 U.S.C. § 2412(d)(1)(B). Because final judgment was not entered in this case prior to the filing of the plaintiff's petition for award of attorney's fees, it is appropriate that the plaintiff's petition be denied without prejudice as premature.

III. Conclusion

For the above-stated reasons, this Court hereby AFFIRMS and ADOPTS the magistrate judge's report and recommendation on the plaintiff's petition for an award of attorney's fees.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to counsel of record herein.

DATED: June 26, 2007

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE